

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 24, 2011

v

CHRISTOPHER MICHAEL MAKIELSKI,

Defendant-Appellant.

No. 296386
Jackson Circuit Court
LC No. 09-005801-FH

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for fleeing and eluding, MCL 750.479a(3), operating a motor vehicle while intoxicated, third offense, MCL 257.625(1), (9), and resisting and obstructing a police officer, MCL 750.81d(1). We affirm.

Receiving a complaint of a male making a disturbance, two Blackman Township Public Safety Officers responded to an apartment complex and saw a man stumbling through the parking lot. The man then entered a white sport utility vehicle (SUV) and drove away, and the officers pursued. The driver did not stop the SUV even after the officers activated the lights and siren on their patrol car. Other officers eventually joined the pursuit of the SUV, which reached speeds of up to 80 miles an hour. Eventually, the SUV struck some trees, and the driver tried to escape on foot. Defendant was apprehended and arrested, and a blood draw, taken pursuant to a warrant, tested positive for .25 grams of alcohol per 100 milliliters of blood.

On appeal, defendant argues that his trial attorney provided ineffective assistance of counsel when he failed to request a new jury panel after the seated panel heard one of the potential jurors comment about defendant having been arrested in the past. Defendant maintains that, at such an early stage of the trial, bringing in new, potential jurors would have been an effective and efficient remedy to the problem. Instead, the entire jury heard the trial knowing that defendant had been arrested before.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there

is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. [*People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004) (internal citations omitted).]

The juror in question was dismissed by the court for cause. After more questioning of the potential jurors, the trial court provided the following cautionary instruction:

Now, . . . one of the jurors . . . that I excused brought up spontaneously that . . . Mr. Makielski may have been arrested before. I don't know what that's for. People could be arrested for lots of things. You could be arrested for, you know, not paying your child support. I want you to disregard that comment. That has nothing to do with this. You can't decide the case because you think well he may have had some police contact before.

Could all of you disregard . . . that comment from that juror that I really—you don't even know exactly what it was for, but I want you to completely disregard that. Could all of you do that?

According to the transcript, the jurors provided a "positive response." The trial court then asked whether the jurors knew of any reason that would prevent them from being fair and impartial, and the jurors provided a "negative response."

Generally, this Court has been reluctant to find ineffective assistance based on an attorney's failure to challenge a potential juror. *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). This is because this Court is incapable of seeing the potential jurors and hearing their answers to questions posed at voir dire. *Id.*

We conclude that defendant cannot show that counsel acted objectively unreasonably. The cited comment was, as references to possible previous criminal history go, relatively innocuous. As the trial court noted, the comment provided no actual information to other potential jurors as to the circumstances of the alleged arrest, whether defendant was actually charged with anything, or any outcome. The trial court correctly admonished the jury to disregard the juror's statement and explained to the jury why the information was irrelevant to deciding whether defendant had committed the crimes charged in this case. After observing the circumstances surrounding the comment and the later instruction, counsel could have reasonably thought the trial court's appropriate cautionary instruction and the jurors' response to it lessened any prejudicial impact. And counsel may well have wanted one or more of the panel to decide defendant's case. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter